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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1303

CITY OF NEW ORLEANS AND ROBERT E. DEVELLE, DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS,

Petitioners,

versus

UNITED STATES OF AMERICA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

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No.

CITY OF NEW ORLEANS AND ROBERT E. DEVELLE, DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS,

Petitioners,

versus

UNITED STATES OF AMERICA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States of America and the Chief Justice and Associate Justices thereof:

City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans, seeks a writ of certiorari to review a final decree of the United States Court of Appeals for the Fifth Circuit rendered on the 6th day of January, 1967, affirming the judgment of the United States District Court for the Eastern District of Louisiana granting the motion for summary judgment ordering the City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans to pay over

and deliver to plaintiff, United States of America, et al, all cash and other obligations now held by the City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans pursuant to the arrangements and agreement dated November 15, 1955 between Chrysler Corporation and City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans, and in connection therewith, respectfully submits the following:

A.

OPINIONS BELOW

The opinion and decree of the United States Court of Appeals for the Fifth Circuit (Appendix"A" and Appendix "B") has not been reported. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court for the Eastern District of Louisiana.

The per curiam decree of the United States Court of Appeals for the Fifth Circuit denying rehearing has not been reported and is annexed hereto as Appendix "C".

The opinion and decree of the Supreme Court of the State of Louisiana, dated June 25, 1959, has been reported at 238 La. 123, 114 So. 2d 579, and is annexed hereto as Appendix "D".

The opinion and decree of the Supreme Court of the State of Louisiana, dated June 4, 1962, has been reported at 243 La. 498, 145 So. 2d 11, and is annexed hereto as Appendix "E".

The decree of the United States District Court for the Eastern District of Louisiana, has not been reported and is annexed hereto as Appendix "F".

B.

JURISDICTION

(a) The abovementioned final decree of the United States Court of Appeals for the Fifth Circuit was entered on January 6, 1967, the day of rendition.

(b) Rehearing was applied for and denied on the 10th day of February, 1967.

(c) On the 17th day of February, 1967 an order was rendered staying the mandate for a period of thirty days to and including the 19th day of March, 1967.

(d) On the 13th day of March, 1967, an order was rendered extending the stay of the mandate to and including the 18th day of April, 1967.

(e) On the 10th day of April, 1967, an order was rendered extending the stay of the mandate to and including the 28th day of April, 1967.

(f) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) because the decision rendered by the United States District Court for the Eastern District of Louisiana, and affirmed by the United States Court of Appeals, involves a federal question decided in a way in conflict with applicable decisions of this Court.

C.

QUESTIONS FOR REVIEW

The questions presented for review are:

(a) Is a Government contractor a purchasing agent of the Government so that vendors sell chattels directly to the Government because a facility contract requires the purchase orders of the contractor to be approved by the contracting officer before submitted to vendors?

(b) If the Supreme Court of Louisiana is in error as to a finding of law that a Government contractor was a purchasing agent of the Government and thereby sales by vendors would go directly to the Government, is the City of New Orleans bound, in the Federal Courts, under the doctrine of collateral estoppel, to this erroneous finding?

(c) Is the City of New Orleans bound under the doctrine of collateral estoppel to a finding of fact by the Louisiana Supreme Court that the Government was the owner of the chattels herein involved where that finding of fact was not an independent finding of fact but obligatory on the court under Louisiana procedure because it was stated as a fact in the petition of the plaintiff, and the matter was before the Court on an exception of no cause of action?

(d) Do the Federal Courts have jurisdiction to entertain a suit where the plaintiffs argued and briefed their State as well as Federal Questions of law and fact through the State Courts, and, having a right by law to writ of certiorari or appeal to the United States Supreme Court choose not to go to that court on review, but file a new suit in the Federal District Court?

D.

ORDINANCE INVOLVED

The ordinance involved is No. 15,201, C.C.S., (City of New Orleans), as amended, for which there is no published edition, reading, in pertinent part as follows:

> "Section 1. Be it ordained by the Commission Council of the City of New Orleans, that the following words, terms and phrases when used in this ordinance have the meaning ascribed to them in this section, except when the context clearly indicates a different meaning:
>
> " * * * (1) 'use' means and includes the exercise of any rights or power over tangible personal prop-

erty incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

"Section 2. That there is hereby levied from and after January 1, 1941, for general municipal purposes, a tax upon the sale at retail, the use, the consumption, the distribution, and the storage in this City, of each item or article of tangible personal property, as defined herein, and upon the lease or rental of such property and the sale of services, within the City of New Orleans; the levy of said tax to be as follows:

"* * * (b) At the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold, but is used, consumed, distributed, or stored for use or consumption in this City; provided there shall be no duplication of the tax."

E.

STATEMENT OF THE CASE

This matter involves the petition for refund by the Chrysler Corporation and United States Government of "use" taxes in the sum of $405,905.00, together with interest thereon paid by the Chrysler Corporation to the City of New Orleans under protest. These taxes were paid because of an assessment by the City of New Orleans against the Chrysler Corporation for "unreported Taxable Sales" in the sum of $40,590,501.80 of tangible personal property acquired by the Chrysler Corporation and which property the Chrysler Corporation had shipped to it at the Michoud Plant in New Orleans.

These taxes were assessed to the Chrysler Corporation pursuant to the provisions of the Sales and Use Tax Ordinance of the City of New Orleans. This ordinance, as it is pertinent to this matter, provides in part as follows:

"Section 2. * * * That there is hereby levied from and after January 1, 1941, * * * a tax upon the sale at retail, the use, the consumption, * * * of each item or article of tangible personal property * * *; the levy of said tax to be as follows:"

"(a) At the rate of one percent (1%) of the sales price of each item or article of tangible personal property when sold at retail in this City; * * *"

"(b) At the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold, but is used, consumed, distributed, or stored for use or consumption in this City; * * * ".

This property was purchased by the Chrysler Corporation in order to perform a so-called "facilities contract" it had entered into with the United States Government under which Chrysler agreed to acquire the necessary tangible personal property in order to convert the Michoud Plant into a facility to produce tank engines. Chrysler was not to make any profit under the facility contract but by the terms of the facility contract Chrysler had the exclusive right to use these facilities in order to make tank engines for the Government. At the same time the facility contract was entered into, a supply contract was entered into between Chrysler and the Government for Chrysler to make tank engines for the Government, at a profit, using these facilities at Michoud.

The present matter is distinguishable from *Livingston vs. United States*, 179 F. Supp. 9, affirmed per curiam, 364 U.S. 281. In *Livingston*, the contractor (DUPONT) "entered the contract solely out of a high sense of public responsibility and not for profit." *United States vs. Boyd*, 378 U.S. 39, 84 S. Ct. 1518, (378 U.S. at page 45, Note 6).

The Chrysler Corporation, upon instruction by the

Government, paid the taxes under protest, and, again under instruction by the Government filed the suit for refund in the State District Court. (Transcript pages 65, 66 and 67.) Chrysler was reimbursed by the Government the amounts paid under protest before filing the suit for refund. The Government then intervened in the suit by Chrysler. As pointed out by the judgment of the United States Court of Appeals for the Fifth Circuit, Appendix "A", page 25, in the instant matter, "The United States through its Attorney General and the Department of Justice was in open, full command of this litigation. See List of counsel 114 So. 2d 579, 145 So. 2d 11. *Bros., Inc. vs. W. E. Grace Mfg. Co.*, 5 Cir., 1958, 261 F. 2d 428, 430-31."

The State District Court granted judgment in favor of the City and Chrysler and the Government appealed to the Louisiana Supreme Court. Chrysler and the Government argued and briefed in the State District Court and the State Supreme Court their Federal as well as State questions of law. The Louisiana Supreme Court reversed the District Court. *Chrysler Corporation vs. City of New Orleans* (238 La. 123, 114 So. 2d 579) (Appendix "D" of this petition). The Louisiana Supreme Court found, that because of the exception of no cause of action which was maintained by the District Court, under Louisiana procedure, the allegations of the petition that the Chrysler Corporation was not the owner of this property had to be taken as true. It further made the finding that:

> "Moreover, as we view the facilities contract, Chrysler was procuring or purchasing the property as an agent of the government.[3]"
>
> "[3]The facilities contract provides that all purchase orders issued by Chrysler for acquisition of equipment, machinery, etc., shall be subject to the prior written approval of the government, through its contracting officer."

See *Chrysler Corporation vs. City of New Orleans*, 114 So. 2d 579, at page 587, 238 La. 123, at p. 147, and appendix "D" of this petition at p. 51.

This was the only reason given by the Louisiana Supreme Court, from the record, in the two times this matter was before it, why the Government was the owner of this property.

On remand there was judgment in favor of Chrysler and the Government. The City appealed to the Louisiana Supreme Court. On this second appeal there was judgment in favor of the City. *Chrysler Corporation vs. City of New Orleans* (243 La. 498, 145 So. 2d 11). (Appendix "E" of this petition.)

Chrysler and the Government sought a stay of the mandate to permit them to take an appeal or writs to the United States Supreme Court. Two days before the stay expired a suit for the refund was filed in the United States District Court for the Eastern District of Louisiana. A motion for summary judgment was made by Chrysler and the Government. The City opposed the motion for summary judgment on several basis, among them being: There was a substantial difference as to a material fact, namely, (1) was the Chrysler Corporation or the Government the Owner of this property, and, (2) was Chrysler the purchasing agent of the Government with the property going, thereby, from the vendors to the Government; The District Court did not have jurisdiction for Chrysler and the Government did not have the right to proceed with the matter in the Federal District Court after having pleaded and argued their State as well as Federal questions of law through the State courts.

The motion for summary judgment was granted. The

City took an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed on the basis that the City was collaterally estopped to challenge the finding by the Louisiana Supreme Court that the Government was the owner of this property. The Fifth Circuit made no independent finding as to ownership from the record. A re-hearing was denied and a stay was granted to permit time in which to file application for Writ of Certiorari or appeal to this Court. An extension of the Stay order was granted to and including April 18, 1967, in which to file application for certiorari with this Court. A further extension of the stay order was granted to and including April 28, 1967.

F.

REASONS FOR GRANTING THE WRIT, ARGUMENT AND AUTHORITIES

I.

Neither the United States District Court nor the United States Court of Appeals for the Fifth Circuit made an independent finding as to whether the Government was the owner of the chattels taxed or that Chrysler was acting as the purchasing agent of the Government and thereby the sales went from the vendors to the United States Government. The Supreme Court of Louisiana, in the two times this matter was before it, made only two findings of fact. In the first Appeal Chrysler Corporation vs. City of New Orleans, 238 La. 123, 114 So. 2d 579, (Appendix "D"), it held two things: It found as fact that the Government always was the owner of this property because the petition of Chrysler alleged this, and, because the matter was before the Court on an exception of no cause of action, this fact had to be taken as correct. It further held as a fact, which is more a conclusion of law, that Chrysler was the

purchasing agent of the Government because of its finding that the facility contract provided that the purchase orders of Chrysler had to be approved by the contracting officer before sent to the vendors. (See Appendix "D" at page 51.) 238 La. 123 at p. 147, 114 So. 2d 579 at p. 587. While the purchase orders had to be so approved, this did not make Chrysler the purchasing agent of the Government. Federal law fashions who is to be a purchasing agent of the Government and this Court has decided in *Alabama vs. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, that these approvals of the purchase orders of the contractor by the contracting officer does not make the contractor the purchasing agent of the Government. This erroneous finding of law by the Louisiana Supreme Court is not binding on the City of New Orleans, before the Federal Courts, on the doctrine of collateral estoppel. The finding by the Federal District Court and the Court of Appeals for the Fifth Circuit that the City was collaterally estopped as to these findings of fact and law by the Supreme Court of Louisiana, it is submitted, is error. In the second appeal Chrysler Corporation vs. City of New Orleans, 243 La. 498, 145 So. 2d 11, (Appendix "E") the Supreme Court of Louisiana made no additional finding of fact from the record but only reiterated its original position that the Government was the owner of this property, the title passing "directly from the various vendors to the United States." (See Appendix "E" at page 56.) 243 La. 498, at p. 505, 145 So. 2d 11, at p. 14.

There was and is a substantial difference as to a material fact, namely, was the Government the owner of this property. The Federal Courts in this matter say the Louisiana Supreme Court decided this fact and the City is collaterally estopped to challenge it. The Louisiana Supreme Court did not make such a finding from the record

but only stated, that this fact had to be taken as true because of the exception of no cause of action then before it. As to the finding of law by the Louisiana Supreme Court that Chrysler was acting as the purchasing agent of the Government (and thereby all sales would pass directly from the various vendors to the Government) was manifestly error of Federal law and certainly not binding as collateral estoppel on the City of New Orleans.

II.

Two days before the stay of the mandate by the Louisiana Supreme Court was to expire the Government and Chrysler (on December 28, 1962) filed the present suit in the United States District Court. It is true that the Government was an intervenor in Chrysler's suit for refund in the State courts. But the Government was in complete command of this litigation and was not a mere intervenor. It could have instructed Chrysler to file the refund suit in the Federal or State Courts, as the City ordinance allows the suit to be filed in either Court. See Appendix "G" attached. Instead the Government instructed Chrysler to file the suit for refund in the State Court. And there in the State courts, the Government and Chrysler briefed, pleaded and argued their State as well as Federal questions of fact and law. It is submitted that under *England vs. Louisiana Medical Board*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440, and *N.A.A.C.P. vs. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, neither Chrysler nor the Government can relitigate these Federal and State questions of fact and law in the Federal courts. It is true that the Government was an intervenor in the State Courts. But the England and Button rule applies to such an intervenor; otherwise, the rule could be nulled by a co-plaintiff instructing the other plaintiff to file in the State Courts and the other plaintiff to intervene, and, then,

when both plaintiff and intervenor argue and plead both their Federal and State questions of fact and law in the State Courts, and, do not secure a judgment to their liking, the intervenor to plead it was only an intervenor and then re-litigate the Federal and State questions of fact and law in the Federal Courts. We must look through form to substance. And what is the substance of the England and Button rule? Precisely to prevent what Chrysler and the Government are here attempting, namely, to prohibit protracted litigation in the Federal Courts when State Courts have passed upon the claims of the parties as to Federal and State rights. The Government and Chrysler had every remedy available to them, **in the Federal Courts,** in 1962, when they secured the stay of the mandate of the Louisiana Supreme Court, to secure by writ of certiorari or by appeal to the United States Supreme Court their claim to Federally protected rights. (28 U.S.C.A. 1257.) It is submitted that under the *England* and *Button* rule to prevent protracted litigation their remedy in the Federal Courts was to the United States Supreme Court to secure their Federally protected rights and not in the Federal District Court.

It is true that the *England* and *Button* cases were in the context of abstention matters. But the rule is not limited to abstention matters. The rule is to prevent protracted litigation in the Federal and State courts. Particularly is the rule applicable in this matter where the respondents were not sent to the State Courts under abstention but having the right to sue in either the State or Federal Court sought out the State Courts to file their claim, and there, in the State courts, briefed and argued their claims as to State and Federal questions of fact and law and, finally, when their remedy was to the United

States Supreme Court they avoided this review and sought relief in the Federal District Court.

G.

CONCLUSION

In conclusion, it is respectfully submitted: first, that the City of New Orleans is not bound under the doctrine of collateral estoppel to an erroneous finding of law by the Louisiana Supreme Court that a Government contractor was a purchasing agent of the Government, because the purchase orders of the contractor were approved by the contracting officer, nor, to the corollary conclusion, that the Government was thereby the owner of the property from the various vendors, as the contractor was the purchasing agent of the Government.

Second, neither is the City, under collateral estoppel, bound to a finding of fact by the Louisiana Supreme Court that the Government was the owner of the chattels herein involved where that finding of fact was not an independent finding of fact but obligatory on the Court under Louisiana procedure because it was stated as a fact in the petition of the plaintiff, and the matter was before the court on an exception of no cause of action.

Third, that the Federal District Court did not have jurisdiction to entertain a suit where the plaintiffs argued and briefed their State, as well as Federal Questions of law and fact through the State Courts, and, having a right by law to writ of certiorari or appeal to the United States Supreme Court choose not to go to that Court on review, but file a new suit in the Federal District Court.

That the opposition of the City of New Orleans to the Motion for Summary Judgment was well taken, in the

light of the foregoing, and that a Writ of Certiorari should issue to the United States Court of Appeals for the Fifth Circuit and, in due course, the judgment of the lower court should be set aside.

Respectfully submitted,

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CERTIFICATE

I, Alvin J. Liska, hereby certify that a copy of the foregoing petition for a writ of certiorari has been served upon counsel of record for the United States Government, the Honorable Thurgood Marshall, Solicitor General of the United States, Department of Justice Building, Washington 25, D. C., Mr. Richard M. Roberts, Acting Assistant Attorney General, Messrs. Lee A. Jackson, I. Henry Kutz, J. Edward Shillingburg, Attorneys, Department of Justice, Washington, D. C., 20530; upon counsel of record for the Chrysler Corporation, Messrs. David J. Conroy and Guy C. Lyman, Jr., Milling, Saal, Saunders, Benson & Woodward, 1122 Whitney Building, New Orleans, Louisiana, 70130; and, upon Mr. Louis C. Lacour, United States Attorney for the Eastern District of Louisiana, Federal Courthouse Building, Royal and Conti Streets, New Orleans, Louisiana, by forwarding same to them at their addresses as hereinbefore set out by U. S. Mail, postage prepaid, air mail when required by the Rules of the Court, and deposited in the Post Office in New Orleans, Louisiana, on this

---------- day of ----------, 1967.

ALVIN J. LISKA,
Counsel of Record for Petitioners.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22554

CITY OF NEW ORLEANS and ROBERT E. DEVELLE,
Director of Finance of the City of New Orleans,

Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 6, 1967.)

Before BROWN, BELL and DYER, Circuit Judges.

BROWN, Circuit Judge: What started out a decade ago as one of those always knotty problems of municipal-state taxation of equipment or materials used or consumed by contractors in the performance of a contract for the Federal Government has been greatly simplified by two trips to the Louisiana Supreme Court and, in a companion state tax case, a trial in the State Court with a successful sequel in the Federal District Court. The case comes to us from a summary judgment in favor of the Government

and against the City of New Orelans. We resist the importunities of the City to require once again a trial on the intrinsic merits and affirm on established principles of collateral estoppel. This means we also reject the other contentions of the City.

The case grows out of a 1951 "facilities contract" by which Chrysler Corporation undertook to acquire and install the necessary machinery and equipment in the Government's vast Michoud Ordinance Plant[1] to adapt it for the production of military tank engines.[2]

In the course of these activities Chrysler acquired approximately 40 million dollars of tangible personal property comprising machinery, equipment, furniture and some materials. Of this about 92% was purchased from vendors outside of Louisiana and shipped to Chrysler at Michoud under usual carriers' commercial bills of lading. The remaining 8% was sold and delivered F.O.B. Michoud or installed by the vendors. In November 1955 the City assessed Chrysler a "use" tax of $405,903.00 under its Sales and Use Tax Ordinance.[3] Fearing a distraint and sale of

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[1] Subsequently Michoud was sold to the New Orleans Dock Board. Its reacquisition by the Government for the Space Program likewise provoked extended litigation. United States v. Michoud Indus. Facilities, 5 Cir., 1965, 322 F. 2d 698.

[2] This facilities contract apparently was at bare cost. Chrysler's profit was to come from its manufacturing activities using a government-owned plant pursuant to a separate contract.

[3] Ordinance No. 15,201, as amended:

"Sec. 2. * * * That there is hereby levied * * * a tax upon the sale at retail, the use, the consumption, the distribution, the distribution and storage in this City, of each item or article of tangible personal property, as defined herein, and upon the lease or rental of such property and the sale of services, within the City of New Orleans; the levy of said tax to be as follows:

"* * *

"(b) At the rate of one per cent (1%) of the cost price of each item or article of tangible personal property when the same is not sold, but is used, consumed, distributed, or stored for use or consumption in this City; provided there shall be no duplication of the tax.

"* * *

"Sec. 1.

"(1) 'Use' means and includes the exercise of any rights or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

its properties and at the direction of the Government, Chrysler arranged for payment under protest and a special escrow agreement. On November 25, 1955, the Government reimbursed Chrysler for the cash and Government bonds deposited in escrow. And on December 13, 1955, again at Government direction, Chrysler instituted its suit in the Louisiana State Courts under Ord. No. 15,201 (note 3, *supra*).[4]

To that suit the Louisiana Trial Court sustained the City's exception of no cause of action presumably on the ground that Chrysler had not paid the tax. On appeal, the Supreme Court of Louisiana reversed and remanded the case. The court held that the petition stated a cause of action. The assessment was invalid because the ordinance taxed the exercise of a right or power over property incident to *ownership*, and Chrysler, in view of the terms of the facilities contract and the allegations of the petition, did not own the property in question. The Court pointed

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[4] "Remedy at law for aggrieved dealer.

"(a) Right of action is hereby created to afford a remedy at law for any dealer aggrieved by the provisions of this Ordinance; and in case of any such dealer resisting the payment of any amount found due, * * * such dealer shall pay the amount found due by the Commissioner and shall give * * * notice, * * * of his intention to file suit for the recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the Commissioner, for a period of thirty (30) days; and if suit be filed within such time for recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. * * *.

"Service of process upon the Mayor of City.

"(b) This section shall afford a legal remedy and right of action * * * for a full and complete adjudication of any and all questions arising in the enforcement of this Ordinance, as to the legality of any tax accrued or accruing or the method of enforcement thereof. * * *.

"Relief in State or Federal Courts.

"(c) This section shall be construed to provide a legal remedy in the State or Federal Courts, by action of law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, * * *, or in any case where jurisdiction is vested in any of the Courts of the United States; * * *."

This substantially tracks the Louisiana State Procedure, LSA-R.S. 47:1576, see note 20, post.

out that the contract provided that title to the property vested in the Government upon the acquisition by the contractor or its subcontractors or upon installation in the plant, whichever occurred first, and that the petition alleged (the allegations of which were to be taken as true on an exception of no cause of action) that, pursuant to the contract, title passed out of the seller and, with no intervening period of time, vested in the Government prior to the time the property came into the State of Louisiana and had continued since in the United States. The court also declared that, in its view of the contract, Chrysler was procuring or purchasing the property as an agent of the Government. *Chrysler Corp. v. City of New Orleans*, 1959, 238 La. 123, 114 So. 2d 579.

The case came back for trial on its merits. On remand, the City filed an exception of want of interest, contending that Chrysler was without interest in the subject matter of the litigation. The trial court overruled the exception, tried the case on its merits, and rendered judgment for Chrysler against the City for $546,517.35, plus interest and costs and denying the City's reconventional demand for penalties and attorneys' fees and an alternative demand for a lessee's tax.

The City appealed. The Supreme Court of Louisiana reversed. Holding that the trial court had erroneously overruled the City's exception of want of interest and dismissing Chrysler's petition, the Court declared:

> "For a right of action under this ordinance, a party must be aggrieved. A pecuniary interest is essential. As we stated in our previous decision herein, the 'use' embraced by the ordinance is the exercise of a right or power over property incident to ownership. The tax is imposed upon the owner. In the instant case the owner was the United States.

> Chrysler paid the tax under instructions of the United States government with attendant reimbursement. Moreover, the United States is ultimately entitled to the money if it is recovered. Under these circumstances, Chrysler does not have the requisite interest to maintain this action."[5]

Under Louisiana procedure the intervention of the United States fell with the main demand of Chrysler. The petition of Chrysler and the United States for rehearing was denied. 243 La. 514, 145 So. 2d 17. The decisions of the Supreme Court of Louisiana have become final.

The present Federal Court action was instituted by the United States and Chrysler on December 28, 1962. It seeks the recovery of the amount held in escrow by the City on the grounds of money illegally had and received, unjust enrichment, and the terms of the escrow agreement. In its answer, the City denied some of the allegations of the complaint and asserted several defenses (i.e., statute of limitations, estoppel, laches, election of remedies, and the Tenth Amendment to the Constitution of the United States) and a counterclaim against Chrysler for the amount of disputed assessment, penalties, etc. The United States and Chrysler moved for summary judgment, asserting that there was no genuine issue as to any material fact, and that the defenses and counterclaim of the City were insufficient in law. The motion was based on affidavits incorporating the opinions, judgments, record, and briefs in the state court litigation.

The Court granted judgment for the United States, ordering the City to pay over all cash and obligations held under the escrow agreement, and dismissed the counterclaim of the City.

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[5] Chrysler Corp. v. City of New Orleans, 1962, 243 La. 498, 145 So. 2d 11, 14.

The City makes two principal attacks. The first is that there are disputed issues of fact. These questions are (a) whether Chrysler was purchasing as agent for the Government and (b) whether the Government became the owner of these properties with Chrysler never acquiring any ownership in them. Consequently, summary judgment was unwarranted. The second is that the Government has not, and cannot now, comply with the tax recovery machinery prescribed in the ordinance (see note 4, *supra*).

Of course, the first attack has to assume that collateral estoppel does not apply. We say "has to assume" because the City's position is unclear. The City's escape from the prior holdings of the Louisiana Supreme Court seems to us to be the impermissible one of showing that that Court was in error. The City really never challenges the proposition that such holdings were essential to the judgment rendered. But since a discussion of the City's contentions on the intrinsic merits illumines the critical question of *essentiality*, some brief comments are warranted.

The City builds its structure on principles to which all subscribe. Capsulated it runs this way. In the early case of *McCulloch v. Maryland*, 1819, 4 U.S. (4 Wheat.) 316, ____ S. Ct. ____, 4 L. Ed. 579, the principle was enunciated, as an interpretation of the supremacy clause of the Constitution, that the property of the Government and its instrumentalities was free from taxation by the States. But two corollaries of this rule exist. First, that property of contractors of the United States Government purchased by these contractors and used by these contractors in the States is subject to taxation by the States. See *Henneford v. Silas Mason Company*, 1936, 330 U.S. 577, 57 S.Ct. 524,

81 L. Ed. 814; *Alabama v. King & Boozer*, 1941, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3; *Curry v. United States*, 1941, 314 U.S. 14, 62 S. Ct. 48, 86 L. Ed. 9. These Government contractors are not instrumentalities of the United States as has been pointed out by the Supreme Court of the United States consistently. See *United States v. Township of Muskegon*, 1958, 355 U.S. 484, 78 S. Ct. 483, 2 L. Ed. 2d 436. The second corollary to the doctrine of *McCulloch v. Maryland* is that as to property directly sold by vendors to the Government and in turn delivered to Government Contractors for their use, the States cannot levy taxes on this property. The two most recent cases affirming this proposition are *United States v. Allegheny County*, 1944, 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209, and *Kern-Limerick, Inc. v. Scurlock*, 1954, 347 U.S. 110, 74 S. Ct. 402, 98 L. Ed. 546.

Against this backdrop and particularly *Kern-Limerick, supra*, and cases of like holding, the City emphasizes what it regards as decisive distinctions. Thus, unlike *Kern-Limerick*, where the contract expressly provided that the contractor "* * * shall act as the purchasing agent of the Government * * * and the Government shall be directly liable to the vendors for the purchase price," and that "Title to all such materials * * * shall pass directly from the vendor to the Government without vesting in the Contractor * * *",[6] the contract here is silent as to agency, imposes no direct liability on the Government to vendors, and is much less positive as to passage of legal title,[7] espe-

[6] See note 2, 347 U.S. 110, 112, ___ S. Ct. ___, ___, 98 L. Ed. 549, 551.

[7] The Chrysler contract stated:

"3. Title to the equipment, machinery and other facilities including installation materials and freight shall vest in the Government upon acquisition by the Contractor or its subcontractors or vendors or upon installation in the Government-furnished plant, whichever first occurs, or upon acquisition or installation for use in other plants when approved by the Contracting Officer, whichever occurs first. To the

(Continued)

cially in view of specific provisions requiring inspection and approval by Government inspectors prior to payment of vendors by Chrysler.[8] These differences and the actual practices followed here of the use of commercial, not Government Bills of Lading, invoices by vendors to Chrysler, not the Government, shipments to Chrysler, not the Government, are enough, so the City urges, to take the case out of *Livingston v. United States*, 1959, E.D. S.C., 179 F. Supp. 9, aff'd, 1960, 364 U.S. 281, 80 S. Ct. 1611, 4 L. Ed. 2d 1719, as construed in *United States v. Boyd*, 1964, 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 713. Indeed, to the contrary, it urges the case is ruled by *Alabama v. King and Boozer*, 1941, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, certainly to the extent of requiring a factual trial and factual determination.

But as earlier stated, we need not assay the correctness of these contentions. The City is making them in the wrong Court at the wrong time. Either from unpersuasiveness in the efforts before the Supreme Court, or more likely, one of those expensive and unwanted consequences of a tactical or strategic position successfully maintained, the fact is that City sought and obtained a clear holding

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[7] (Continued)
extent permitted by law the said equipment, machinery and other facilities shall remain personalty or movables, notwithstanding the fact that they may be affixed or attached to realty or immovables.

"4. All purchase orders issued or other contracts made by the Contractor for the acquisition and installation of the equipment, machinery and other facilities and for the performance of any other work provided for in this contract shall be subject to the prior written approval of the Contracting Officer.

[8] "Payment on Acquired or Completed Items: Upon the acquisition by the contractor of materials, equipment, machinery, and other facilities required under the contract, or upon the installation, renovation or the completion of manufacture of any of the above described property by the Contractor hereunder, the Contracting Officer shall promptly inspect and accept or reject such items and thereafter, upon presentation of property certified invoices or vouchers or other evidence of payment, reasonably satisfactory to the Contracting Officer, the Government shall re-imburse the Contractors for all costs and expenditures made under this contract."

that the United States, not Chrysler, was the owner of these properties. In a contest between the same parties or those in privity,[9] neither can relitigate that issue if—and the if here is no if at all—it was necessary to the decision.[10]

The essentiality of these holdings is quickly demonstrated. At the trial on the merits after remand from the Supreme Court's first decision, the Louisiana trial court overruled the exception of want of interest filed by the City and granted judgment for Chrysler.

On the second appeal, the City contended that (1) Chrysler, not the United States, purchased the property from the vendors; (2) Chrysler did not transfer title to the United States until the property had been accepted at the Michoud Ordnance Plant in New Orleans; (3) Chrysler exercised rights incident to ownership of the property in New Orleans; (4) Chrysler did not purchase the property for resale but used and consumed it in performing its contract to deliver a facility to produce tank engines; and alternatively (5) Chrysler was liable for a lease tax.

But in the event the Court found that Chrysler did not own the property, then the City contended that the Court must dismiss the petition for want of interest. The

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[9] The United States through its Attorney General and the Department of Justice was in open, full command of this litigation. See list of Counsel 114 So. 2d 579, 145 So. 2d 11. Bros Inc. v. W. E. Grace Mfg. Co., 5 Cir., 1958, 261 F. 2d 428, 430-31.

[10] The Government's brief cites these Federal and Louisiana cases. Cromwell v. County of Sac., 1876, 94 U.S. 351, 353, 24 L. Ed. 195; New Orleans v. Citizens' Bank, 1897, 167 U.S. 371, 396-399, 17 S. Ct. 905, 42 L. Ed. 202; United States v. Moser, 1924, 266 U.S. 236, 241-242, 45 S. Ct. 66, 69 L. Ed. 262; Commissioner v. Sunnen, 1948, 333 U.S. 591, 597-598, 68 S. Ct. 715, 92 L. Ed. 898. See also, Heroman v. Louisiana Institute of Deaf and Dumb, 1882, 34 La. Ann. 805, 814-815; California Co. v. Price, 1958, 234 La. 338, 99 So. 2d 743, 746-747; Johnson v. Lemons, 1963, La. C.A., 157 So. 2d 752. To these may be added many more, e.g., United States v. Burch, 5 Cir., 1961, 294 F. 2d 1, 5-6; Adams v. United States, 5 Cir., 1961, 287 F. 2d 701, 703-04; Seaboard Airline R.R. Co. v. George F. McCourt Trucking, Inc., 5 Cir., 1960, 277 F. 2d 593. Regarding "essential" facts, see generally Restatement, Judgments § 68, comments n, o (1942).

City, relying on *Krauss Co. v. Develle*, 1959, 236 La. 1072, 110 So. 2d 104,[11] and distinguishing *Bel Oil Corp. v. Fonenot*, 1959, 238 La. 1002, 117 So. 2d 571,[12] asserted that the right to maintain a refund action under the ordinance was vested only in the person who was taxed and who paid the tax (even though subsequently reimbursed by another). If Chrysler had never owned the property, then it was not taxed, and it could not maintain the action.[13]

The Government on the other hand, argued that no tax was due because the property was that of the United States, not Chrsyler, and the tax was incident to ownership. As to want of interest, it urged Chrysler, though reimbursed, had standing under *Bel Oil* (note 12, *supra*).

Thus, as the case was presented to the Supreme Court

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[11] In *Krauss*, merchants sought the refund of city sales taxes collected by them from their customers on merchandise delivered outside the Parish of Orleans. They contended that they were aggrieved within the meaning of Section 15 of the Ordinance. The City contended that the tax was imposed on the purchasers, that they alone had a remedy for refund, and that since the merchants were not taxpayers they were without interest to sue for money which did not belong to them. The Court sustained exceptions of want of interest, relying on Kesbec, Inc. v. McGolderick, 1938, 278 N.Y. 293, 16 N.E. 2d 288, and holding that only the customers who were taxed by the ordinance and who had paid the taxes could maintain an action for refund.

[12] In *Bel Oil*, a gas gatherer (Bel Oil) paid under protest a gas gathering tax and was reimbursed by its customer (Calcasieu). The court held the tax invalid and allowed the gas gatherer to recover it in a refund action brought under a statute (LSA-R.S. 47:1576) substantially identical to Section 15 of the Ordinance. The trial court had previously held that the customer could not maintain the action. See also Bel Oil Corp. v. Roland, 1962, 242 La. 498, 516, 137 So. 2d 308, 314-315.

[13] Thus in its Original Brief on Merits, the City urged:

"In the instant case the ordinance levels the tax at the owner. Under the holding of this Court in the above two cited cases [Krauss Co. v. Develle, 1959, 236 La. 1072, 110 So. 2d 104 and Bel Oil Corp. v. Fontenot, 1959, 238 La. 1002, 107 So. 2d 571] only the owner, the person against whom the tax is levied and who pays the tax, has the right of action under the ordinance 15(a) to maintain the action for refund. If the United States Government is found by this Court to have been the owner of this property before it came into Louisiana and into New Orleans, the Chrysler Corporation has no right to maintain the action for refund. Only the Government, who is the owner, and, is taxed under the Ordinance, and, who paid the tax, could maintain the action for the refund. (See Act 330 of 1938, Section 2(a))."

of Louisiana, the Court first had to determine whether Chrysler had ever owned the property in New Orleans. If it did, then the Court had to consider Chrysler's alternative argument that its purchase was still exempt from the tax because it purchased for resale. However, if the Court found that Chrysler did not own the property, then, under the City's argument, the Court had to dismiss the action. Consequently, ownership of the property was the key issue for consideration.

The Supreme Court of Louisiana maintained the City's exception of want of interest and reversed. The rationale of the Court was that under the principle of the *Krauss* case the only one who could bring a refund action under Section 15 of the Ordinance was the one who was taxed and who paid the tax.[14]

And as though once was not enough, the City in response to the Government's petition for rehearing on the question of standing, added to its strong contentions earlier made (see note 13, *supra*) in order to hold onto its victory.[15]

The City cannot have it both ways. It cannot claim the Government is the owner to deny standing to Chrysler, the payor, and when that is achieved turn on the Government to say that Chrysler was the owner.

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[14] Its reasons are quoted above at note 5 and related text.

Additionally, ownership was also critical in the Court's analysis and application of the taxing ordinance:

"As we stated in our previous decision herein [238 La. 123, 114 So. 2d 579] the 'use' embraced by the ordinance is the exercise of a right or power over property incident to ownership. *The tax is imposed upon the owner. In the instant case the owner was the United States.*" (Emphasis added.) 243 La. at 505-506, 145 So. 2d at 14.

[15] In its brief in opposition to Government's petition for rehearing, the City concluded:

"The fact that the City assessed the tax to Chrysler does not change the rule of the *Krauss* case. There could only be one owner of the property and this Court has held that the Government is the owner. The owner, the Government, paid the tax to Chrysler. And the owner, the Government, is the one whom the ordinance levels the tax at."

By Louisiana standards of standing under Louisiana procedure, ownership in the Government was critical. What is critical is essential. And what is essential may be tried but once.[16]

There was nothing to try. Summary judgment was warranted.

It having been judicially determined beyond recall or retrial that the Government, not Chrysler, was the owner, the only question left is whether the United States in its own Courts can maintain an action to get its own money back. Arguing in the negative, the City contends that the time and notice limitations of the ordinance (see note 4, *supra*) forbid recovery now. But this is really to engage in a sort of now-you-see-it-now-you-don't sleight of hand. It urges that while Chrysler took timely action, its payment was a nullity because in reality it was made not for its own account, but for that of the Government who actually reimbursed Chrysler shortly. And while the Government, not Chrysler, actually paid the tax, the Government cannot recover it even though invalid since it was paid through one having no liability and therefore no standing to recover it back.

Against the inequities of such a procedural trap, we think there is ample power in the United States District

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[16] The City is in agreement that the dismissal of the Government's intervention by the Supreme Court of Louisiana has no prejudicial effect. Under Louisiana law, an intervenor cannot maintain an action after the plaintiff's petition has been dismissed, but is relegated to asserting his cause of action by an independent action. Barron v. Jacobs, 1886, 38 La. Ann. 270; Gorman v. Gorman, 1925, 158 La. 274, 103 So. 766; Erskine v. Gardiner, 1926, 162 La. 83, 110 So. 97.

But in view of this Louisiana procedural result there is nothing to the City's claims that under abstention principles the Government is now cut off from this resort to its own Court under NAACP v. Button, 1963, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, or England v. Louisiana State Bd. of Medical Examiners, 1964, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440.

Court to protect the sovereign against such unjust enrichment on familiar principles of money had and received. *United States v. Independent School Dist. No. 1*, 10 Cir., 1954, 209 F. 2d 578; *United States v. City of Philadelphia*, E.D. Pa., 1943, 50 F. Supp. 170 approved by this Court, *United States v. Paddock*, 5 Cir., 1949, 178 F. 2d 394.[17] This harmonizes with the usual principle that Federal law fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions.[18]

This holding makes it inescapable for us to disapprove as to the United States the contrary conclusion in the companion case growing out of collection of $900,000 for Louisiana State sales and use tax, LSA-R.S. 47:301, on Chrysler's Michoud activities. *United States v. Cocreham*, E.D. La., 1965, 247 F. Supp. 731.[19] Judge West, in a full opinion tracing the identical course of that case under a state tax refund statute, LSA-R.S. 47:1576, in all respects identical to the city ordinance (note 4, *supra*) holds the parties, as do we, to the earlier judicial finding of ownership in the Government, not Chrysler. However, recovery was

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[17] "Turning to the question of voluntary payments, see United States v. City of Philadelphia, 171, 50 F. Supp. 170, wherein the court said: 'It has also been repeatedly held that the defense of voluntary payment is not good as against the United States.' See also United States v. Wurts, 303 U.S. 414, 58 S. Ct. 637, 638, 82 L. Ed. 932, wherein the court said: 'The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid. 'No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute,' United States v. Bank of Metropolis, 15 Pet. 377, 401, 10 L. Ed. 774. * * * .'" 178 F. 2d 394, 396-97.

[18] See, e.g., Board of Commissioners v. United States, 1939, 308 U.S. 343, 60 S. Ct. 285, 84 L. Ed. 313; United States v. Bureau of Revenue, 10 Cir., 1961, 291 F. 2d 677; United States v. Independent School Dist. No. 1, supra; Bryan County Okl. v. United States, 10 Cir., 1941, 123 F. 2d 782; United States v. City of Philadelphia, supra.

[19] Now pending on appeal to this Court, No. 23589. We do not undertake to determine any other issues therein presented.

denied because the United States did not and could not comply with the tax refund statute, LSA-R.S. 47:1576.[20]

None of the City's other contentions deserve mention. Summary judgment and effectuating injunctive orders were correct.

AFFIRMED.

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[20] The Court seems to mix both procedural timeliness and substantive inability for the Government to bring itself under 47:1576. The latter is based on the neat logic that the United States paid no tax. Indeed, no tax constitutionally could have been assessed against it. The predicament of the Government arises from its premature reimbursement of Chrysler. This deprived Chrysler of its opportunity for refund. The Government loses out because "At the same time, the United States, not having been assessed any tax by the State of Louisiana, simply has no standing under the provisions of the statute to bring this suit for the refund of monies paid to the State of Louisiana by some third party." 247 F. Supp. 731, 739.

Judge West therefore concluded: "The State of Louisiana had no authority to levy or collect a tax from the United States of America, nor did it ever attempt to do so. The United States never paid any tax to the State of Louisiana, either voluntarily or involuntarily, and because of this fact, the United States did not and could not comply with the provisions of LSA-R.S. 47:1576. This statute, being the only means by which one can sue for the recovery of taxes paid, and the United States not having complied with that statute, it obviously cannot maintain this action against the State of Louisiana for a refund of these taxes." Id. at 740-41.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM 1966

No. 22554

D. C. Docket No. Civil Action 12988

CITY OF NEW ORLEANS and ROBERT E. DEVELLE,
Director of Finance of the City of New Orleans,
Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, BELL and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby,

AFFIRMED.

January 6, 1967

Issued as Mandate:

APPENDIX "C"

Filed Feb 10 1967
U. S. Court of Appeals
Edward W. Wadsworth
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22554

CITY OF NEW ORLEANS and ROBERT E. DEVELLE,
Director of Finance of the City of New Orleans,
Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(February 10, 1967.)

ON PETITION FOR REHEARING

Before BROWN, BELL and DYER, Circuit Judges.

PER CURIAM: It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby

DENIED.

APPENDIX "D"

SUPREME COURT OF LOUISIANA

CHRYSLER CORPORATION

v.

CITY OF NEW ORLEANS.

No. 44521

June 25, 1959.

Rehearing Denied Oct. 9, 1959.

Appeal from the Civil District Court, Parish of Orleans, Division "D", The Honorable Rene A. Viosca, Judge.

HAWTHORNE, Justice.

This suit was instituted by Chrysler Corporation against the City of New Orleans to recover a use tax paid by Chrysler under protest. The United States of America intervened in the suit and prayed that there be judgment in favor of Chrysler and against the city as prayed for in Chrysler's petition. To the original and supplemental petitions filed by Chrysler as well as to the petition of intervention filed by the United States the city filed exceptions of no cause of action. The exceptions were maintained, the suit was dismissed, and Chrysler Corporation, plaintiff, and the United States of America, intervenor, have appealed to this court.

The use tax involved in this appeal, which was assessed against Chrysler and paid by it under protest, and which it seeks to have refunded, is $401,712.81, plus interest amounting to more than $130,000.00. The assessment of the tax by the city was based on the *use* by Chrysler Corporation in the City of New Orleans of tangible personal property, and the city assessed and levied the tax under its ordinance No. 15,201 C.C.S. as amended, which fixes the tax at the rate of 1 per cent of the cost price of each item or article of such property. Attached to and made part of plaintiff's petition are numerous documents including the ordinance above mentioned and a so-called facilities contract which we shall discuss later.

The pertinent provisions of the ordinance under which the assessment was made are as follows:

* * * * *

"Section 1. * * * That the following words, terms, and phrases when used in this Ordinance have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning.

"(e) A 'Retail Sale', or a 'sale at retail,' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and a sale of services, as herein set forth * * *.

"(*l*) *'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof*, except that it shall not include the sale at retail of that property in the regular course of business.

* * * * *

"(p) 'Tangible personal property' means and includes personal property which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term

'tangible personal property' shall not include stocks, bonds, notes or other obligations or securities.

"Section 2. That there is hereby levied from and after January 1, 1941, for general municipal purposes a tax upon the sale at retail, *the use*, the consumption, the distribution, the distribution and the storage in this City, of each item or article of tangible personal property, as defined herein, and upon the lease or rental of such property and the sale of services, within the City of New Orleans; the levy of said tax to be as follows:

* * * * *

"(b) At the rate of one per cent (1%) of the cost price of each item or article of tangible personal property when the same is not sold, but is used, consumed, distributed, or stored for use or consumption in this City; provided there shall be no duplication of the tax.

"Section 3. That the aforesaid tax at the rate of one percent (1%) of the retail sales price, as of the moment of the sale, or one percent (1%) of the cost price, as of the moment of purchase, or one percent (1%) on sales or services, as herein defined, as the case may be, shall be collectible from all persons, as defined herein, engaged as dealers, as hereinafter defined, in the sale at retail, *the use*, the consumption, the distribution, and the storage of tangible personal property, and the sale of service, as herein defined. * * *

"The term '*dealer*' is further defined to mean every person, as used in this Ordinance, who imports, or causes to be imported, tangible personal property from any State, or other political subdivisions of this State, or foreign country for sale at retail, *for use* or consumption, or distribution, or for storage *to be used* or consumed in this City. * * *

"On all tangible personal property imported, or caused to be imported, from other states or other

political subdivisions of this State, or foreign country, and used by him, the 'dealer', as thus defined, shall pay the tax imposed by this Ordinance on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this City. For the purpose of this Ordinance, use, or consumption, or distribution, or storage of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event. * * *

"Section 4. * * *

"(a) The tax herein levied shall be collected by the dealer from the purchaser or consumer.

* * * * *

"Section 16. That the liability of any person, or dealer arising from any tax, interest and penalty or any of them imposed by this Ordinance, from the time they are due, shall *be a personal debt of such person*, or dealer to the City of New Orleans, recoverable in any Court of competent jurisdiction in an action at law by the Commissioner of Public Finance in the name of the City. Such debt, whether sued upon or not, shall be a lien on all the property of such delinquent person, or dealer, except as against an innocent purchaser for value without notice in the actual course of business, and shall have preference in any distribution of the assets of the person, or dealer whether in bankruptcy, insolvency, or otherwise. The proceeds of any judgment or order obtained hereunder shall be paid to the Commissioner of Public Finance. * * * " (Italics ours.)

As a device for supplementing or complementing the sales tax, resort has been made to use or compensating taxes. A use tax is an integrated part of a sales tax, one

of its purposes being to prevent purchases of tangible personal property outside the city in an effort to escape the payment of a tax on local sales, and this is one of the purposes of the use tax imposed in the New Orleans ordinance involved in this suit.

The ordinance of the City of New Orleans provides for a tax upon retail sales of tangible personal property in the city, and upon the use, consumption, distribution, and storage of such property in the city, and upon the leasing or rental of such property and the sale of services within the city. This ordinance in Section 3 provides that a "dealer" means every person who imports or causes to be imported tangible personal property from any other state or other political subdivision, etc., for sale at retail or use or consumption in this city, and that upon all such personal property imported and used by him the dealer, as defined in the ordinance, shall pay the tax imposed by the ordinance on all articles of tangible personal property just as if the articles have been sold at retail for use or consumption in this city, and that for the purpose of the ordinance use of tangible personal property shall be equivalent to sale at retail.

The pertinent facts as disclosed by the petition and the documents attached to it are these:

In 1951 the United States government leased, let, and demised to the contractor, Chrysler, a certain parcel of land together with all the buildings and improvements, equipment, machinery, etc., designated as Michoud industrial facilities. In this contract the contractor was given for the duration of the lease the right to have, hold, use, occupy, and enjoy the leased premises without any suit, trouble, or molestation, eviction, or disturbance. Pursuant to this contract, which was designated as a facilities

contract, Chrysler prepared plans and specifications for the rearrangement, restoration, and modification of the Michoud industrial facilities in order to adapt them to the tank engine production capacity required by the United States. Under this contract the contractor, subject to approval of the government contracting officer, installed in the rehabilitated plant the tools, machinery, and equipment necessary for the production of tank engines. The equipment, tools, and machinery were acquired for government account by Chrysler, mostly from vendors outside the State of Louisiana, and under the terms of these procurements title and ownership passed to the United States, remained in the United States, and at no time was in Chrysler. Chrysler paid the sellers for the machinery, tools, and equipment, but was promptly reimbursed by the United States. Chrysler was required to maintain a marking and identification system, and upon the arrival of the equipment, tools, etc., at Michoud, they were marked as evidence of their ownership by the United States. There was no liability on Chrysler for the loss, damage, or destruction of the government-furnished plant or of this equipment and machinery. Furthermore, Chrysler was not entitled to any fee or profit for the acquisition or installation of the equipment, machinery, and other facilities. Chrysler used the property so installed, which had been acquired by it for the government, in order to perform supply contracts it had entered into with the United States government for the production of tank engines.[1] Under the terms of the contract and the allegations of the petition such equipment, machinery, and facilities, at the time of the acquisition from the sellers and since, were tangible movable personal property.

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[1] It was argued and apparently conceded that Chrysler derived a profit for the manufacture and production of tank engines for the United States government under the supply contracts.

The use tax assessed and collected from Chrysler by the city was on the use of tangible personal property acquired by the government through Chrysler under the facilities contract during the period from April 1, 1951, through April 30, 1954, and the tax was based on the purchase or cost price of such property.

For the purpose of considering the exception of no cause of action it must be conceded *that title to and ownership of the tangible movable property, the value or cost of which was used as the basis of the tax, and which was acquired by Chrysler in the manufacture of tank engines at the government-owned Michoud plant, was in the United States government.*

[1] Although the tax which plaintiff seeks to recover was computed on the cost price of the property, it was not imposed on the government-owned property, and consequently does not infringe the federal government's immunity from state and local taxation.

The city says that the tax which plaintiff here seeks to recover, and which was levied by the city under the provisions of its ordinance, "is in all particulars the same as the use tax upheld by the Supreme Court of the United States of America" in the following cases: United States of America and Borg-Warner Corporation (Detroit Gear Division) v. City of Detroit, 355 U.S. 466, 78 S. Ct. 474, 2 L. Ed. 2d 424; United States v. Township of Muskegon, 355 U.S. 484, 78 S. Ct. 483, 2 L. Ed. 2d 436; City of Detroit v. Murray Corporation of America, 355 U.S. 489, 78 S. Ct. 458, 2 L. Ed. 2d 441.

In the Borg-Warner case the United States as owner of an industrial plant in Detroit leased a portion of the plant to Borg-Warner Corporation at a stipulated annual rent for use in the latter's private manufacturing business.

A tax was assessed against Borg-Warner under a statute of Michigan based on the value of the property leased and computed at the rate used for calculating real property taxes.

In the Muskegon case the United States government granted to Continental Motors Corporation the right to use a manufacturing plant owned by it in the course of performing several supply contracts Continental had with the government. No rent was charged for the property, but Continental agreed not to include any part of the cost of the facilities furnished by the government in the price of the goods supplied under the contract. Continental was assessed with a tax under the same Michigan statute because of Continental's use of tax-exempt property in its private business, and the tax was measured by the value of the tax-exempt property that Continental was then using.

Apparently the principal factual difference in the two cases was that in the Borg-Warner case the property was being used under a formal lease from the government, whereas in the Muskegon case Continental was using the property under a permit in the performance of its contract with the government.

The Michigan statute under which the tax was imposed in each of these cases is an act "to provide for the taxation of lessees and users of tax-exempt property", and provides:

> "Sec. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, * * * [such lessee or user] shall be subject to taxation in the same amount and to the same extent as though

the lessee or user were the owner of such property * * *.

* * * * *

"Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. * * *" Pub. Acts 1953, No. 189.

In the Borg-Warner case part of the tax was paid under protest, and the corporation and the United States filed suit for a refund of the amount paid, charging that the tax was repugnant to the Constitution of the United States because it imposed a levy on government property and discriminated against those using such property.

In the Muskegon case Continental refused to pay the tax, and the suit was brought by state authorities to recover the amount assessed. The United States government intervened in the suit, contending that the tax was invalid because it imposed a levy on government property.

The United States Supreme Court held in both of these cases that the tax was not one imposed upon government property so as to be repugnant to the Constitution of the United States. In addition, in the Muskegon case the United States Supreme Court rejected the argument that the imposition of the tax by the Michigan statute was discriminatory, pointing out that the tax applied to every private party who used exempt property in Michigan in connection with a business conducted for private gain.

In the Murray Corporation case, supra, Murray Corporation was acting as a subcontractor under a prime contract for the manufacture of airplane parts between two other private companies and the United States. By agreement title to all parts, materials, and work in process ac-

quired by Murray in performance of the subcontract vested in the United States upon partial payment even though Murray retained possession. The City of Detroit and the County of Wayne each assessed a tax against Murray based on the value of materials and work in process in its possession to which the United States held title. Murray paid the taxes under protest and then brought suit for a refund, contending that title to the property was in the United States, and that the taxes infringed the federal government's immunity from state taxation to the extent that the taxes were based on such property. The United States government intervened in Murray's behalf. In rejecting the contention of Murray and the government, the United States Supreme Court pointed out that the taxes involved imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. The statute under which the tax was assessed in this case provides in part: "The owners or persons in possession of any personal property shall pay all taxes assessed thereon. * * *" [355 U.S. 489, 78 S. Ct. 469]

These three cases appear to be full authority for the proposition that the federal government's constitutional immunity from state and local taxation is not infringed when state and local governments impose on a private individual or corporation a tax on the renting, use, or possession of property which itself is immune from taxation because of its ownership by the United States government, where such property is used in the course of the private individual's or corporation's own business and to derive a profit.

The Michigan statute provides that the tax which was the subject of the litigation in the Borg-Warner and Muskegon cases is a tax on the *leasing*, *loaning*, or *use* of real

property which for any reason is exempt from taxation, where such tax-exempt property is used by a private individual or corporation in connection with a business conducted for profit. The statute under which the tax was assessed in the Murray Corporation case imposed a tax on the *possession* of any personal property. Both of these statutes make it clear that the tax there imposed is on the mere use or possession without right to ownership. In other words, the statutes do not tax the use or possession as the exercise of a right "incident to the ownership" of the property.

[2] This brings us to the serious question which we are called upon to answer in this case: Does the ordinance of the City of New Orleans impose upon the mere use of tangible personal property in the City of New Orleans a tax based on the cost price of the property, to be paid by the user who is not the purchaser of the property where title to the property is in the United States government which is the purchaser?

[3] As stated previously, the city contends that the tax imposed by its ordinance is in all particulars the same as the taxes upheld by the Supreme Court in the three cases cited and discussed above. We do not think that this statement is correct. The laws under which the taxes were imposed in those cases levied a tax on the *mere* leasing, use, or possession and did not require the use or possession to be incident to ownership. The ordinance of the City of New Orleans imposes the tax upon the use of tangible personal property but defines "use" to mean and include "the exercise of any rights or power over tangible personal property *incident to the ownership thereof*". In other words, the word "use" in the New Orleans ordinance is qualified by the phrase "incident to the ownership thereof".

The words "incident to the ownership thereof" cannot be ignored so as to leave the tax on the *mere* use or possession. Webster's New International Dictionary (1938) defines "incident" thus: "* * * .3. *Law.* Something appertaining to, passing with, or depending on, another, called the principal." "Incident", according to Black's Law Dictionary (1944), "* * * denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the 'principal'. * * *" Under these definitions "ownership" is the principal to which the "use" is incidental, and the use upon which the ordinance levies the tax is the exercise of any rights or power over tangible personal property connected with, inherent in, depending on, and inseparably belonging to the ownership of that property.

[4] The ordinance provides that the tax therein levied shall be collected by the dealer. We observe that in Section 2 as amended it imposes a tax of 1 per cent of the gross profits derived from the lease or rental of tangible personal property where the lease or rental of such property is an established business or the same is incidental or germane to the business, and in Section 3 of the ordinance a dealer is further defined to mean any person who is the *lessee* or rentee of tangible personal property and "who pays to the owner of such property a consideration for the *use or possession of such property without acquiring title thereto*". (Italics ours.) In other words, the ordinance imposes a tax on the use of property where such use is incidental to ownership—that is, where the user is the owner—, the tax there being based on the cost price of the property;[2] and it likewise imposes a tax on the use or possession of property under a lease where the

[2] The tax involved in this suit was assessed and collected by the city under this provision of the ordinance.

user or possessor of such property does not acquire title thereto, the tax there being levied on gross profits derived from the lease. In other words, these provisions of the ordinance cover two different situations—one where the user is the owner, and the other where the user or possessor does not have title but is using and possessing under a lease. The fact that the ordinance imposes a tax under each of these situations confirms us in our conclusion that when the tax is assessed on the "use" of the property and is based on the cost price of the tangible personal property, the user must be the owner of the property.

We therefore conclude the Chrysler's use of the tangible personal property was not the exercise of a right or power over the property incident to the ownership thereof. Consequently the assessment of the tax by the city based on the cost price of the property was improper.

The courts of other states have had occasion to consider the meaning of the phrase "incident to the ownership" as that phrase is used in statutes imposing a use tax. See General Motors Corporation v. State Commissioner of Revenue and Taxation, 182 Kan. 237, 320 P. 2d 807, certiorari denied 358 U.S. 875, 79 S. Ct. 115, 3 L. Ed. 2d 105, and Avco Mfg. Corporation v. Connelly, 145 Conn. 161, 140 A. 2d 479.

The statute concerned in the Kansas case defines "use" thus: "The word 'use' means and includes the exercise within this state by any person of any right or power over tangible personal property incident to the ownership of that property * * *." G.S. 1949, 79-3702(c). That provision is almost identical with the provision of the New Orleans ordinance which we are considering, and that case is very similar to this one. There the assessment of the tax was made on the use of machinery and equipment pur-

chased outside the State of Kansas and brought into the state for use by General Motors in establishing production capacity for the manufacture of military airplanes, the purchases being made pursuant to a facilities contract with the United States government. The Kansas Supreme Court annulled and set aside the assessment of the tax, and in the course of the opinion said:

> "The government owned the property upon entry into the state and continuously thereafter. In the last analysis, the use of such property by the corporation was merely to accomplish the purpose of the owner—the production of military aircraft for the government. Its use of the property was not 'incident to the ownership of that property.'" [182 Kan. 237, 320 P. 2d 812.]

In the Connecticut case the facts are likewise very similar to those in the case at bar. There the government awarded to Avco Manufacturing Corporation a so-called facilities contract providing for the use by the corporation of government-owned plant and facilities and for the purchase and installation of certain new facilities. Under this contract Avco purchased machinery which it installed and used for the production of aircraft engines and parts. Avco received no profit on the purchase and installation of the facilities. A use tax assessment was made against Avco under the provision of a Connecticut statute which defines "use" as including "the exercise of any right or power over tangible personal property incident to the ownership of that property". Gen. St. 1949, § 2091(6). It is to be noted that this statute is almost identical with the provisions in the New Orleans ordinance defining "use". The court said: "It seems clear that storage and consumption, as well as use, must be incident to ownership for the use tax to apply." [145 Conn. 161, 140 A. 2d 485.]

Appellee, the city, argues that under the facilities contract Chrysler had the right to "have, hold, use, occupy, possess and enjoy" the tangible personal property imported into the City of New Orleans, and that in fact it exercised these rights; that consequently the city had a right under its ordinance to levy a tax on the exercise of these rights based upon the value of the property which Chrysler was using. The city further says that since Chrysler had the right to "hold, use, occupy, possess and enjoy" the tangible personal property in order to carry out its supply contract with the government, such use by Chrysler constituted a limited or quasi ownership of the property. Appellee cites several Louisiana cases which it says support these statements, but the cases are not apposite or controlling under the facts of this case and need not be discussed.

There is no merit in the city's argument. The rights of use and possession which Chrysler had were derived from its contract of lease with the government and were not incident to ownership. If the ordinance here imposed a tax based on the value of the property on mere use or possession, the argument of the city might be sound, but the ordinance does not do this. Instead it imposes a use tax on "the exercise of any rights or power over tangible personal property incident to the ownership". In other words, the use tax is imposed upon the owner of the property who is exercising these rights by virtue of or incident to his ownership of the property. To hold that the tax here involved had been legally assessed and collected we would have to ignore and completely disregard the phrase "incident to the ownership thereof" and say that notwithstanding this phrase the tax here levied was on the *mere* use of the property. If the tax was on the mere use, then why the phrase "incident to the ownership thereof"? If it had been intended that mere use was to be taxable, it

would have been easy for the framers of this ordinance to provide that " 'Use' means and includes the exercise of any rights or power over tangible personal property" without employing the qualifying phrase "incident to the ownership thereof".

In brief filed by the Collector of Revenue of the State of Louisiana as amicus curiae the argument is made that title to the tangible personal property passed to Chrysler for a short time before vesting in the United States because the purchases made by Chrysler were f. o. b. sellers' plants or f. o. b. other points outside Louisiana, and that consequently the tax was legally levied and collected under the provisions of the ordinance. In support of this argument the collector cites and relies on United Aircraft Corporation v. Connelly, 145 Conn. 176, 140 A. 2d 486. In that case two contracts were involved which provided that title to the property should pass to the government on delivery to the contractor at the contractor's plant, and the Connecticut court reasoned that the goods shipped under these contracts on an f. o. b. shipping point basis belonged to the contractor during shipment.

[5] We are considering the instant case on exception of no cause of action and must accept as true the well pleaded allegations of the petition in connection with the documents attached. The contract in the instant case provides that title to the property "shall vest in the Government upon acquisition by the Contractor or its subcontractors or vendors or upon installation in the government-furnished plant whichever occurs first", and the petition itself alleges that "pursuant to the Facilities Contract title to all of such items of equipment, machinery and other facilities passed out of the seller and, with no intervening period of time, vested in the Government prior to the time at which the said property came into the State of Louisi-

ana, and has ever since continued in the Government". In short, according to the petition and the documents attached title passed directly from the vendors to the government and never vested in Chrysler. Moreover, as we view the facilities contract, Chrysler was procuring or purchasing the property as an agent for the government.[3]

The judgment sustaining the exceptions of no cause of action is reversed and set aside, and the case is remanded for further proceedings according to law.

FOURNET, Chief Justice (concurring).

While it seems illogical that one using in this state tangible personal property of which he is the *owner* must pay a use tax of 1% of the *cost* of the item, whereas one using this same property for the identical purpose under a *lease* agreement with a subsidiary of the owner, or any *third party*, need pay a tax of 1% on only the *gross profits* derived from the leased property, or on the price paid for the *rental* thereof, I feel, nevertheless, constrained to concur with the views expressed in the majority opinion, for, irrespective of any views I might entertain with respect to the definition of the word "use" in Section 1(e) 1 (" 'Use' means and includes the exercise of *any rights* or power over tangible personal property incident to the ownership thereof," if not otherwise limited or explained), as has been ably demonstrated in the majority opinion, the ordinance itself recognizes that although it is the use that is being taxed, the two categories of users—owners and lessees—sought to be reached are to be taxed on a different rate basis, that is, cost in the case of owners, profit or rent in the case of lessees. (The emphasis has been supplied.)

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[3] The facilities contract provides that all purchase orders issued by Chrysler for acquisition of equipment, machinery, etc., shall be subject to the prior written approval of the government, through its contracting officer.

APPENDIX "E"

SUPREME COURT OF LOUISIANA

CHRYSLER CORPORATION

v.

CITY OF NEW ORLEANS

No. 46021

June 4, 1962.

Dissenting Opinion June 19, 1962.

Rehearing Denied Oct. 3, 1962.

On Appeal from the Civil District Court, Division "D", Parish of Orleans, Honorable Rene A. Viosca, Judge.

SANDERS, Justice.

This is a suit by Chrysler Corporation to recover use taxes and interest in the sum of $546,517.35 paid to the City of New Orleans under protest. The United States intervened in the suit and prayed for judgment in favor of Chrysler. The district court originally sustained an exception of no cause of action filed by the City and dismissed the suit. On appeal to this Court, we reversed the judgment and remanded the case for trial. See Chrysler

Corporation v. City of New Orleans, 238 La. 123, 114 So. 2d 579.

On remand the City filed an exception of want of interest on the ground that Chrysler had been reimbursed by the United States for all taxes paid and, hence, was without interest in the subject matter of the litigation or right of action.

The district court overruled the exception and, after trial, rendered judgment in favor of the plaintiff as prayed for. This appeal by the City followed.

[1-3] In 1951 the United States leased the Michoud plant at New Orleans to Chrysler for the production of tank engines. Under a facilities contract with the government, Chrysler undertook to modify, equip, and adapt the plant to produce these engines. The use taxes collected from Chrysler by the City were on the use of tangible, personal property imported by Chrysler from outside the City for installation in the plant.

The pertinent provisions of Ordinance 15,201 C.C.S. as amended, under which the assessment was made, are as follows:

> "* * * Section 1. * * * That the following words, terms, and phrases when used in this Ordinance have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning.
>
> "(e) A 'Retail Sale', or a 'sale at retail', means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and a sale of services, as herein set forth * * *.
>
> "(l) *'Use' means and includes the exercise of any rights or power over tangible personal property incident to the ownership thereof*, except that it

shall not include the sale at retail of that property in the regular course of business.

* * * * *

"(p) 'Tangible personal property' means and includes personal property which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term 'tangible personal property' shall not include stocks, bonds, notes or other obligations or securities.

"Section 2. That there is hereby levied from and after January 1, 1941, for general municipal purposes a tax upon the sale at retail, *the use*, the consumption, the distribution, the distribution and the storage in this City, of each item or article of tangible personal property, as defined herein, and upon the lease or rental of such property and the sale of services, within the City of New Orleans; the levy of said tax to be as follows:

* * * * *

"(b) At the rate of one per cent (1%) of the cost price of each item or article of tangible personal property when the same is not sold, but is used, consumed, distributed, or stored for use or consumption in this City; provided there shall be no duplication of the tax.

"Section 3. That the aforesaid tax at the rate of one per cent (1%) of the retail sales price, as of the moment of the sale, or one per cent (1%) of the cost price, as of the moment of purchase, or one per cent (1%) on sales or services, as herein defined, as the case may be, shall be collectible from all persons, as defined herein, engaged as dealers, as hereinafter defined, in the sale at retail, *the use*, the consumption, the distribution, and the storage of tangible personal property, and the sale of service, as herein defined. * * *

"The term '*dealer*' is further defined to mean every person, as used in this Ordinance, who imports, or causes to be imported, tangible personal

property from any State, or other political subdivisions of this State, or foreign country for sale at retail, *for use* or consumption, or distribution, or for storage *to be used* or consumed in this City. * * *

"On all tangible personal property imported, or caused to be imported, from other states or other political subdivisions of this State, or foreign country, *and used by him*, the 'dealer', as thus defined, shall pay the tax imposed by this Ordinance on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this City. For the purpose of this Ordinance, use, or consumption, or distribution, or storage of tangible personal property, shall each be equivalent to a sale at retail and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

"Section 15. * * *

"(a) *A Right of action is hereby created to afford a remedy at law for any dealer aggrieved by the provisions of this ordinance;* and in case of any such dealer resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such dealer shall pay the amount found due by the Commissioner and shall give the Commissioner notice, at the time, of his intention to file suit for the recovery of the same; * * * " (Emphasis ours.)

The record discloses that the title of the property at no time vested in Chrysler, but passed directly from the various vendors to the United States. Chrysler paid the taxes on instructions of the United States government under a reimbursement agreement. The United States fully reimbursed Chrysler prior to the institution of this suit and is ultimately entitled to the money if it is recovered.

Hence the exception of want of interest stands at the threshold of the case.[1]

For a right of action under this ordinance, a party must be aggrieved. A pecuniary interest is essential.[2] As we stated in our previous decision herein, the "use" embraced by the ordinance is the exercise of a right or power over property incident to ownership. The tax is imposed upon the owner. In the instant case the owner was the United States. Chrysler paid the tax under instructions of the United States government with attendant reimbursement. Moreover, the United States is ultimately entitled to the money if it is recovered. Under these circumstances, Chrysler does not have the requisite interest to maintain this action.

The present case falls within the principle of Krauss Company v. Develle, 236 La. 1072, 110 So. 2d 104. In that case Krauss Company sought to recover sales tax paid to the City of New Orleans on merchandise which it had sold. The district court dismissed the suit. In affirming the judgment this Court stated:

> "It appears that the basis of the lower court's finding was the fact that the plaintiffs were not aggrieved within the intendment of Sections 56-96 and Sections 56-97 of the Code of the City of New

[1] Plaintiff suggests that this exception has been previously ruled upon by this Court in the form of an exception of no right of action. An examination of our previous decision in this case discloses that only the question of whether the petition stated a *cause* of action was considered. See Chrysler Corporation v. City of New Orleans, 238 La. 123, 114 So. 2d 579.

[2] Section 15(a) Ordinance 15,201 C.C.S.; Krauss Company v. Develle, 236 La. 1072, 110 So. 2d 104; cf. Article 15, Louisiana Code of Practice, Succession of Alstock, 230 La. 167, 88 So. 2d 14; Interdiction of Maestri, 213 La. 313, 34 So. 2d 790; Losavio v. Losavio Realty Co., 212 La. 23, 31 So. 2d 412; Ideal Savings & Homestead Ass'n v. Scott, 181 La. 978, 160 So. 783; Waterhouse v. Star Land Co., Ltd., 139 La. 177, 71 So. 358; Quaker Realty Co. v. Labasse, 131 La. 996, 60 So. 661; Succession of Vicknair, La. App., 126 So. 2d 680; Orr v. Walker, La. App., 104 So. 2d 226; 39 American Jurisprudence Parties § 10, pp. 859-860; 11 TLR 527.

Orleans because the amounts paid to the city by the plaintiffs as taxes were collected from and passed on to the consumers by the plaintiffs.

"The plaintiffs contend that they are specifically given a right to institute these suits under the provisions of Section 15(a) of Ordinance No. 15, 201 C.C.S., as amended, which provides:

" 'Right of action is hereby created to afford a remedy at law for any dealer aggrieved by the provisions of this Ordinance; * * *'

They take the position that they are aggrieved within the meaning of this provision of the Ordinance. While, on the other hand, the city takes the position that the tax was not imposed on the plaintiffs but upon the purchasers, that they alone had a direct remedy for the refund of such taxes, and that since the plaintiffs are not taxpayers they are without interest to sue for a refund of money that does not belong to them. The city says that the plaintiffs are merely acting in the capacity of agents for the city in the collection of the tax.

"Neither counsel for the plaintiffs nor the defendant has cited any decision of this Court involving the issue raised herein and we are unable to find any decision wherein such question was posed in this state. However, the decision in the case of Kesbec, Inc. v. McGoldrick, 278 N.Y. 293, 16 N.E. 2d 288, 119 A.L.R. 536, wherein the same question was involved seems to be well founded and should be accepted by this Court. In that case the court held that a dealer in gasoline could not recover a refund of taxes on gasoline collected by it from customers under a city regulation because it had no beneficial interest since the tax was not imposed upon the dealer but fell upon the consumer."

[4, 5] The fact that the United States as an intervenor prays for judgment in favor of Chrysler is of no moment. This does not convert the suit into one by Chrys-

ler for the use and benefit of the United States. The intervention either stands or falls with the main demand. Since the main demand must fall, the intervention falls with it. Holley v. Butler Furniture Co., 217 La. 8, 45 So. 2d 747; Erskine v. Gardiner, 162 La. 83, 110 So. 97.[3]

In support of its position, Chrysler relies upon the decision of this Court in Bel Oil Corporation v. Fontenot, 238 La. 1002, 117 So. 2d 571. In that case Bel Oil Corporation and Calcasieu Paper Co. sought to recover gas gathering taxes paid under LSA-R.S. 47:1576. Under a contract Calcasieu had reimbursed Bel, the gas gatherer, for the taxes. This Court maintained Bel's right to bring suit for a refund and maintained an exception as to Calcasieu on the ground that "any liability of the Paper Company for the tax arose under its private agreement and not under any provision of the statute." In that case the statute imposed the tax only on the gas gatherer, Bel; whereas in the present case the ordinance imposes the tax on the owner, not Chrysler but the United States. Hence that case is distinguishable.

For the reasons assigned the judgment of the district court overruling the exception of want of interest filed on behalf of the City of New Orleans is reversed; the exception of want of interest is maintained; plaintiff's suit is dismissed at its costs; and the intervention of the United States of America is dismissed at its cost.

HAMITER and SUMMERS, JJ., dissent with written reasons.

HAMITER, Justice (dissenting).

[3] The suit, intervention, and exception of want of interest in the instant case were filed prior to the adoption of the Louisiana Code of Civil Procedure enacted by Act No. 15 of 1960. Compare Article 1039, LSA-C.C.P. relative to voluntary dismissals on motion of plaintiff.

I am unable to agree with the conclusion reached by the majority.

The position assumed by the defendant City of New Orleans under the exception of want of interest, and adopted by this court, is totally inconsistent with its initial levying and enforced collecting of the tax. The sole basis for the levy, as pointed out in our opinion on the exception of no cause of action directed to the petition (see 238 La. 123, 114 So. 2d 579), was that plaintiff had exercised rights of ownership to the equipment involved. And in arguing in support of that exception the City urged that the contract between Chrysler Corporation and the United States government created a quasi-ownership of such property in plaintiff. Also, in the answer, filed prior to tendering the instant exception, the defendant specifically denied all of plaintiff's allegations that it was not the owner. Accordingly, I am of the opinion that the defendant should not in good conscience now contend, and it is error for this court to hold, that such lack of ownership by plaintiff precludes its recovering the tax which it was compelled to pay (on the City's insistence that it did own the property). To allow the defendant under the exception of want of interest to defeat recovery of the illegally collected tax, after its having challenged facts which if admitted in the first instance would have prevented the enforced collection thereof, is to permit that municipality to unjustly enrich itself at the expense of another in violation of Revised Civil Code Article 1965.

Krauss Company, Limited v. Develle, 236 La. 1072, 110 So. 2d 104, relied on by the majority, is not applicable or analogous. That case dealt with a sales tax which the plaintiff merchant was compelled under the terms of an ordinance to collect from its customers. Consequently, we

reasoned that the vendor was merely a collector and had no beneficial interest in the validity of the tax. As we said therein the "tax was not imposed upon the dealer but fell upon the consumer." Involved here, on the other hand, is a use tax; and it was imposed on Chrysler Corporation, not on the United States government for which the equipment was purchased and installed. Incidentally, the City was unconcerned with whether Chrysler, because of contractual undertakings with another, might be reimbursed for the amount of the tax if due and paid by it. Too, Chrysler's only remedy, with respect to the City, was to pay the tax under protest and then to seek its return. Clearly such remedy, specifically granted by the ordinance, could not be affected by an agreement between plaintiff and the government as to which should ultimately bear the tax indebtedness if found to be due.

Most important, if the City's position under its exception of want of interest be correct then no one can recover the illegally collected tax involved here. Certainly the United States government cannot, because it has not paid any tax under protest. Indeed, based on that theory the City (at the time of tendering the instant exception) filed exceptions of no right and no cause of action to the government's intervention.

I respectfully dissent.

SUMMERS, Justice (dissenting).

The city's position is that the right of action for refund of taxes paid under protest vests solely in the person whom the statute places the tax against and who pays the tax, and the right of action for refund cannot be delegated to a third person.

Chrysler contends that its action for refund is properly brought as it is a taxpayer in accordance with the

provisions of Article X, Section 18 of the Louisiana Constitution of 1921, LSA, Act 330 of 1938, LSA-R.S. 47:1576, 47:2110 and Section 15(a) of Ordinance No. 15,201, C.C.S., referred to in the majority opinion.

Under the facts of this case the city, asserting that the tax was placed against Chrysler, demanded payment of the taxes from Chrysler, not the United States. Chrysler, not the United States, paid the taxes under protest; Chrysler gave notice of its intention to file suit for recovery, not the United States; and Chrysler did in fact file this suit within the allotted time after payment under protest. Thus, all of the requirements for instituting suit pursuant to Section 15 of Ordinance No. 15,201, C.C.S., were met by Chrysler.

I am of the opinion that the cause of action for refund of the tax arose at the moment of the payment by Chrysler, and the rights thus created were vested, and should govern the disposition to be made of this suit for refund. I fail to see how reimbursement to Chrysler by the United States could alter these rights, and particularly in such a manner that no one could sue for the refund, which is the result of the majority opinion.

It is true that this court's decisions in this case on two occasions—238 La. 123, 114 So. 2d 579, and the majority opinion now under consideration—found the tax was improperly collected from Chrysler inasmuch as the *use* of the property was not an *incident of their ownership*. In other words the tax was not properly placed against Chrysler, although they did pay it. The majority holding results in the strange anomaly that, although the tax was collected from Chrysler erroneously because Chrysler paid the tax under protest, with money received from the United States under its facility contract, Chrysler cannot recover

the taxes because these taxes were not properly placed against Chrysler.

I understand the majority holding to mean that if reimbursement were not involved there would be no question about Chrysler's right to succeed in this case.

I am of the opinion that a contract between a taxpayer and another, whereby the taxpayer is reimbursed the taxes paid and is obliged to seek recovery for the benefit of the indemnitor, does not and cannot operate to deprive the taxpayer of his right to proceed under Section 15 of the ordinance. Bel Oil Corporation v. Fontenot, 238 La. 1002, 117 So. 2d 571.

The Krauss Company case relied upon by the majority is effectively distinguished by Mr. Justice HAMITER in his dissenting opinion.

Furthermore, the majority opinion fails to dispose of the city's reconventional demand against Chrysler as the taxpayer for penalties, audit costs and attorney's fees.

I respectfully dissent.

ON APPLICATION FOR REHEARING

PER CURIAM.

In a joint application for a rehearing, plaintiff Chrysler Corporation, and intervenor, United States of America, are still contending that, under our decision in Bel Oil Corporation v. Fontenot, 238 La. 1002, 117 So. 2d 571, Chrysler has a real and actual interest to recover the taxes it paid under protest despite the fact that it has been fully reimbursed by the United States government for the taxes it paid the City of New Orleans. In view of the earnestness of their industrious counsel, we have re-

examined our opinion in Bel Oil Corporation v. Fontenot and conclude that it is without application to this case.

In that matter, Bel Oil and Calcasieu Paper Company, Inc. brought suit to recover gas gathering taxes assessed against Bel Oil, which were paid by Bel under protest, contending that the statute under which the tax was levied was unconstitutional. The defendant, Collector of Revenue, filed an exception of no right of action to the claim of Calcasieu Paper Company and this exception was sustained by the district judge on the ground that Calcasieu, notwithstanding its reimbursement of Bel for the taxes assessed against the latter, was not the taxpayer and, therefore, had no right to proceed against the Collector for taxes paid by Bel. Bel's right of action to maintain the suit was not even questioned nor was it an issue in the case, either in the lower court or on appeal.[1] Consequently, the decision in that case cannot be regarded as authority for Chrysler's position in the instant suit, i. e., that its reimbursement by the Federal government for all taxes it paid to the city prior to the institution of this suit for a refund did not divest it of the right of action it normally would have had but for such reimbursement.

Indeed, the position of Chrysler in this case is indistinguishable in principle from that of plaintiff, Ritsch Alluvial Land Company, in Ritsch Alluvial Land Co. et al. v. Adema et al., 211 La. 675, 30 So. 2d 753. In that matter, Ritsch and its vendee, Lenmark Lands, Inc., brought suit against the defendants to annul a tax sale of certain real

[1] In our original opinion in this matter it was inadvertently stated that, in the Bel case, this Court "* * * maintained Bel's right to bring suit for a refund * * *". And we further attempted to distinguish the Bel case, erroneously we now think, on the premise that, since the Ordinance in this case imposed the use tax on the owner of the property, which was the United States and not Chrysler, the cases were different. Actually, the Bel case is inapplicable here because Bel's right to maintain the action was never questioned nor passed on. (See also Bel Oil Corporation v. Roland, 242 La. 498, 137 So. 2d 308.)

property to the defendants in the year 1930 while Ritsch was the owner thereof. Before the suit was brought, however, Ritsch quitclaimed the land to the other plaintiff, Lenmark Lands, Inc. and agreed in the act of conveyance that, should it ever become necessary to prosecute any legal action with respect to the property conveyed, such legal action could be instituted in its name by its vendee. The defendants filed an exception of no right of action to the petition of Ritsch claiming that it was without interest to maintain and prosecute the suit. This exception was sustained below, the judge holding that Ritsch had no interest in the litigation which would satisfy the requirements of Article 15 of the Code of Practice. In affirming this ruling on appeal the Court, in an opinion by the late Chief Justice O'Niell, stated:

> "If the Ritsch Alluvial Land Company had refused to permit the use of its name by the Lenmark Lands, Inc., the Ritsch Alluvial Land Company thereby would have violated its contractual obligation; but the mere passive action required of the Ritsch Alluvial Company by the contract, i. e., to permit its name to be used by Lenmark Lands, Inc., did not create in the Ritsch Alluvial Land Company an interest in the subject matter of the litigation. To sustain this contention of the plaintiffs would render Article 15 of the Code of Practice meaningless."

So, in the case at bar, the circumstance that Chrysler agreed with the United States to prosecute this suit does not vest it with an interest in the litigation—for, having already been reimbursed for the taxes it had paid under protest and having agreed that any amount recovered by it would be turned over to the United States, it had nothing to recoup by the suit nor does its failure to recover affect it adversely in any manner.

We have examined the other contentions raised by applicants in their petition and find no merit in them.

The application for a rehearing is refused.

HAMITER and SUMMERS, JJ., dissented from the refusal to grant a rehearing.

APPENDIX "F"

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 12,988

UNITED STATES OF AMERICA, and CHRYSLER CORPORATION,
Plaintiffs

v.

CITY OF NEW ORLEANS, and ROBERT E. DEVELLE, Director of Finance,
Defendants

} JUDGMENT

Plaintiffs' motion for summary judgment, pursuant to Rule 56 of the Rules of Civil Procedure, having been briefed and argued in open court, and the Court being fully advised,

The Court finds that there is no genuine issue as to any material fact, that the affirmative defenses and counter-claim set forth in defendants' answer are insufficient in law, and that on the established facts plaintiffs are entitled in law to the relief prayed in the complaint; and

It is therefore ordered, adjudged and decreed that plaintiffs' motion for summary judgment be and the same hereby is granted; that defendants' counter-claim be and hereby is dismissed; that defendants assign, pay over and deliver to plaintiff United States all cash and other obligations now held by defendants pursuant to the arrange-

ment and agreement dated November 15, 1955, between plaintiff Chrysler Corporation and defendants and pursuant to the order of preliminary injunction herein dated April 2, 1963; and that plaintiffs have judgment for their costs and disbursements herein.

Dated and entered at New Orleans, Louisiana, this 10th day of February, 1965.

/s/ FRANK B. ELLIS
UNITED STATES DISTRICT JUDGE

APPENDIX "G"

CITY OF NEW ORLEANS SALES AND USE TAX ORDINANCE, NO. 15,201, C.C.S., AS AMENDED:

SECTION 15. BE IT FURTHER ORDAINED, ETC., That:

Remedy at law for aggrieved dealer.

(a) Right of action is hereby created to afford a remedy at law for any dealer aggrieved by the provisions of this Ordinance; and in case of any such dealer resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such dealer shall pay the amount found due by the Commissioner and shall give the Commissioner notice, at the time, of his intention to file suit for the recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the Commissioner, for a period of thirty (30) days; and if suit be filed within such time for recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. If the dealer prevails, the Commissioner shall refund the amount to the claimant, with interest at the rate of two percent (2%) per annum, covering the period from the date said funds were received by the Commissioner to the date of refund.

Service of process upon the Mayor of City.

(b) This section shall afford a legal remedy and right of action in any State or Federal Court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Ordinance, as to the legality of any tax accrued

or accruing or the method of enforcement thereof. In such actions, service of process shall be upon the Mayor of the City of New Orleans as provided in the City charter.

Relief in State or Federal Courts.

(c) This section shall be construed to provide a legal remedy in the State or Federal Courts, by action of law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the Courts of the United States; provided that upon request of dealer and upon proper showing by such dealer that the principle of law involved in an additional assessment is already pending before the Courts for judicial determination, the said dealer, upon agreement to abide by the decision of the Courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the Commissioner until the question of law involved has been determined by the Court and shall then be disposed of as therein provided.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1303

CITY OF NEW ORLEANS and ROBERT E. DEVELLE, DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, PETITIONERS

v.

UNITED STATES OF AMERICA and CHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is an action by the United States and Chrysler Corporation to recover approximately $545,000 in city use taxes and interest which Chrysler paid under protest. Pursuant to a contract with the United States, Chrysler undertook to acquire for the government the machinery and equipment necessary

to adapt the Michoud Ordnance Plant in New Orleans to produce military tank engines. Petitioners assessed use taxes upon Chrysler's use of the property which it acquired for the government in carrying out this contract. Chrysler entered into an agreement with petitioners for payment of the tax by delivering cash and bonds to be held in safekeeping pending a final judicial determination. Pursuant to their contract, the United States reimbursed Chrysler for the amount paid under protest, and the government is entitled to any part of the fund recovered. (Pet. 18-19; R. 16-22, 46, 65-71).[1]

Chrysler instituted a suit for refund in a Louisiana State court, and the United States subsequently intervened. The Supreme Court of Louisiana determined in that litigation (1) that the city ordinance[2] taxed only the use of tangible personal property by its *owner*, not the use of the property by someone else, and (2) that the United States, not Chrysler, was the owner of the property in question. *Chrysler Corp.* v. *City of New Orleans* (Pet. 35-51, 53-63). Based on this conclusion, the Supreme Court of Louisiana held (1) that Chrysler did not have the requisite standing under Louisiana procedure to maintain the suit for a refund since it was not the owner of the property and had been reimbursed by the United States (Pet. 57), and (2) that this conclusion

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[1] "R." references are to the printed record filed in the court of appeals.

[2] Sections 1(1) and 2, Ordinance No. 15,201, Commission Council Series (Pet. 18, fn. 3).

required dismissal of the government's intervention, since under Louisiana law an intervenor cannot maintain the action after the main demand of the plaintiff has been dismissed (Pet. 58-59).

The United States then instituted the instant case in a federal court as an independent action to recover the fund based on unjust enrichment, money had and received, and the escrow agreement, contending that since the city may not tax the United States on property owned by the United States[3] and the ordinance did not purport to tax Chrysler, a non-owner, it followed that the tax was invalidly collected (R. 8-11). Chrysler has been joined as a party plaintiff only to insure that the United States is granted complete relief. The district court granted summary judgment for the United States (R. 84-85; see also R. 29, 32-33, reported at 215 F. Supp. 895). The court of appeals affirmed (371 F. 2d 21, rehearing denied, Pet. 33), holding (1) that the district court had "ample power * * * to protect the sovereign against such unjust enrichment on familiar principles of money had and received" (Pet. 28-29), and (2) that petitioners were collaterally estopped from relitigating the determination of the Louisiana courts that the United States, not Chrysler, was the owner of the property (Pet. 22-28).

The decision below is correct, and there is no conflict or other basis for further review.

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[3] *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *United States* v. *Allegheny County*, 322 U.S. 174, 176-177.

1. Petitioners first argue that the court of appeals erred in holding petitioners collaterally estopped by the Louisiana courts' determination that the United States owned the property. Petitioners' argument, that the prior determination should not be controlling because it is wrong, contradicts the very bases underlying the doctrines of *res judicata* and collateral estoppel—*i.e.*, "considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597. If the issue has been decided between the parties, then it matters not in subsequent litigation between them whether it was decided rightly or wrongly. As this Court stated in *United States* v. *Moser*, 266 U.S. 236, 242, "a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law" (emphasis in original). See also *Scotland County* v. *Hill*, 112 U.S. 183, 187; *Gunter* v. *Atlantic Coast Line R. R. Co.*, 200 U.S. 273, 290. As the court of appeals demonstrated (Pet. 24-28), the issue of ownership was central to the decision in the State court proceedings and was considered and resolved by the Louisiana courts.[4]

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[4] Petitioners' suggestion that the Louisiana Supreme Court did not make a finding of ownership from the record (Pet. 10-11) is not supportable. On the second hearing, after a full trial on the merits, the Louisiana Supreme Court specifically stated that "The record discloses that the title of the property at no time vested in Chrysler, but passed directly from the various vendors to the United States" (Pet. 56).

Petitioners' attempt to have the federal courts reverse the determination of ownership made by the Louisiana State courts is curious. In the State court proceedings they contended that the United States was the owner and, consequently, that Chrysler lacked standing to maintain that action (Pet. 26-27, fns. 13-15). As the court of appeals noted (Pet. 27), "The City cannot have it both ways. It cannot claim the Government is the owner to deny standing to Chrysler, the payor, and when that is achieved turn on the Government to say that Chrysler was the owner." [5]

2. Petitioners also argue that the district court lacked jurisdiction to entertain this action. From *N.A.A.C.P.* v. *Button*, 371 U.S. 415, and *England* v. *Medical Examiners*, 375 U.S. 411, petitioners conclude that the prior litigation in the State courts bars the United States from seeking recovery in the federal courts, so that "protracted litigation" may be prevented (Pet. 11-13). The *Button* and *England* de-

[5] Nor is there any merit in petitioners' argument that the Louisiana Supreme Court erroneously found that the United States was the owner. The contract specifically provided that title vested in the government upon acquisition by Chrysler (Pet. 23, fn. 7); thus there was no basis for finding ownership in Chrysler (Pet. 45-49, 50). See *Avco Mfg. Corp.* v. *Connelly*, 145 Conn. 161, 140 A. 2d 479; *General Motors Corp.* v. *State Com'n. of Rev. & Taxation*, 182 Kan. 237, 320 P.2d 807, certiorari denied, 358 U.S. 875. Moreover, since Chrysler's acquisitions were entirely on behalf of and under the control of the government (Pet. 50-51), it acted as the government's agent in making them and the property thus acquired belonged to the government. See *Avco Mfg. Corp.* v. *Connelly, supra; General Motors Corp.* v. *State Com'n. of Rev. & Taxation, supra.*

cisions dealt with cases originating in the federal courts but referred to State courts under the doctrine of abstention. The rule announced in *England* is that a party to such a case has no right to relitigate federal questions in the federal district court if he "freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there * * *." 375 U.S. at 419.

Contrary to petitioners' statement (Pet. 12), the Louisiana State courts did not decide the claim of the United States for recovery of the fund. The prior State court proceedings, instituted by Chrysler with the United States as intervenor, terminated with the conclusion that while the United States owned the property (thus rendering the tax invalid), Chrysler lacked the requisite standing to recover the tax. The government's intervention fell, under Louisiana law, with the main demand (Pet. 58-59). As the court of appeals noted, after such a dismissal the intervenor is, under Louisiana law, "relegated to asserting his cause of action by an independent action" (Pet. 28, fn. 16). And this it is free to do in the forum of its choice, including the federal district court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 262902 882